80-1351

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ALEXANDER L. STEVAS,

In the
Supreme Court of the United States

October Term, 1980

NO. _____

RAY J. BERAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered in 1980.

QUESTIONS PRESENTED FOR REVIEW

1. Is there a denial of due process when Defendant is required to interpret conflicting cases from different Circuits in preparing and presenting a defense?

2. Must a mistrial be declared when the U.S. Attorney repeatedly ignores the specific directions of the Court while impeaching Defendant under Rule 609 (A) (1) Federal Rules of Evidence?

3. What probative value can a prior conviction of "Misapplication of Bank Funds" have where the charge is "Fraudulent Use of the Mail"?

4. May the Court ignore an inquiry from the Jury as to "What is the law concerning the responsibilities of a partner?" where offense charged involves acts by various persons in a business partnership with partnership aspects?

5. Must there be specific testimony and/or evidence adduced in the course of the trial for the Jury to find the accused guilty as charged?

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1651(a).

CITATIONS TO OPINIONS BELOW

The opinions of the United States Court of Appeals for the Tenth Circuit is Slip Opinion No. 79-1581 filed November 6, 1980 and is set out in Appendix "A" infra @ p. 15. The Judgment and Probation/ Commitment Order of the United States District Court for the District of Colorado in Case No. 78-CR-392-1 was filed May 11, 1979 and is set out in Appendix "B" infra @ p. 26.

STATEMENT OF THE CASE

This is an appeal from a judgment and conviction in the United States District Court for the District of Colorado. Defendant was indicted on two (2) counts of Securities Mail Fraud (15 U.S.C. 77q(a) and 2, plus three (3) counts of Mail Fraud (18 U.S.C. 1341).

A motion to sever defendant's trial from that of co-defendants Kaminski and Griffith was granted.

The matter proceeded to trial by Jury and the defendant was convicted of one (1) count of securities mail fraud and three (3) counts of mail fraud.

Timely motions for acquittal and for new trial were filed and denied. The judgment and conviction were entered on May 7, 1979, and timely notice of appeal was filed on May 17, 1979.

Briefs were submitted as required, and in due time the Circuit Court of Appeals for the Tenth Circuit filed its decision of affirmance on November 6, 1980.

Petitioner promptly filed his Petition for Re-Hearing and that Petition was denied on December 9, 1980 and Petitioner now seeks a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

PETITION IS ENTITLED TO HAVE A CLEAR, UNEQUIVOCAL LINE OF DECIDED CASES TO GUIDE HIM IN PREPARING AND PRESENTING HIS DEFENSE

Such did not obtain in this case as this Court candidly admitted at the outset. See Transcript @ p. 6, L. 1-9:

> "THE COURT: I realize Counsel have a peculiar responsibility in interpreting the Andrews case, the Krohn case, the Gutierrez case, the Lowther case *in this Circuit in contradistinction to the James case in the Fifth Circuit and in the Enright case.* Plus the Petrozziello case from the *Fifth Circuit.*
>
> *"I realize there is not a steady thread,* but you understand the procedure that the Court is going to require you to go through." (emphasis supplied) *U.S. v. Krohn,* 573 F.2d 1382, 1387 (10th Circuit, 1978); *Lowther v. U.S.,* 455 F.2d 657 (10th Circuit, 1972); *U.S. v. Andrews,* 585 F.2d 961 (10th Circuit, 1978);

This court should resolve these admitted differences.

II.

PLAIN ERROR WAS COMMITTED BY THE TRIAL COURT WHEN IT DECIDED THAT RULE 609(A) (1) OF FEDERAL RULES OF EVIDENCE WOULD APPLY IN THE IMPEACHMENT OF DEFENDANT AS TO CREDIBILITY

The Court's attention is respectfully referred to the Transcript at p. 33, L. 16-25 and p. 34, L. 1-16:

> "THE COURT: The advisory Committee notes use this language in part of Congressional debate as to whether a prior conviction shall be allowed to come in, and that is where there are aspects of dishonesty and prior conviction, false statement, and then they have as illustrative crime such as perjury, embezzlement, false statement, fraud, deceit, untruth, falsity bearing on prosperity to testify truthfully.
>
> "Now the Court is satisfied that the conviction which ultimately was affirmed by the Eighth Circuit has comparability in regard to credibility to the extent that it would in this case, and the Court expressly finds that the probative value of admitting the evidence in this case, considering the nature of the charges before the Court here, and those that were involved in affirmation of the Eighth Circuit case, outweighs its prejudicial effect to the Defendant.
>
> "The Court has admitted into evidence the prior — the indictment of the prior case. The Court has studied the affirmation by the

Eighth Circuit, the language that they use. They also referred to the opinion by the Trial Judge.

"The Court has reviewed the opinion by the Trial Judge in the other case. The Court is satisfied that this is within the ambit of 609. The Court has made the express finding that the probative value of admitting the prior conviction in this case outweighs its prejudicial effect to the Defendant. The Court will allow it to come into evidence."

It is here questioned as to what "probative value" a prior conviction for Misapplication of Bank Funds could possibly have where the charge is Fraudulent use of the Mail.

III.

A MISTRIAL SHOULD BE DECLARED WHEN THE U.S. ATTORNEY REPEATEDLY IGNORES THE SPECIFIC DIRECTIONS OF THE COURT WHILE IMPEACHING DEFENDANT'S CREDIBILITY.

Please refer to the Transcript at p. 585, L. 11-24 and p. 586, 587, and 588, L. 1-21:

"Q. *Did those four felony counts refer to or concern bank fraud and embezzlement?*

"MR. BOGUE: Your Honor, I will object to that.

"THE COURT: The Court will sustain the objection. The accuracy of that statement. You understand that, please?

"MR. MUNSINGER: Yes, Your Honor.

"THE COURT: You get the transcript or you get the reportered opinion and use the language in the opinion.

"MR. MUNSINGER: Yes, Your Honor. I understand that.

"THE COURT: Disregard the last question, ladies and gentlemen. It will be stricken from the record. Do you understand that, please?

"MR. BOGUE: Your Honor, may we approach the bench?

"THE COURT: Please.

(Whereupon, the following discussion was had at the bench between Court and Counsel, outside the hearing of the jury)

"MR. BOGUE: I am going to — I want to move for a mistrial on the basis of Counsel's remarks. They do not accurately reflect what the charge was. My understanding is that what the charge was was misapplication of bank funds.

"MR. MUNSINGER: Now my understanding was the charge was 656, Title 18, Section 656.

"MR. BOGUE: That's not correct.

"MR. MUNSINGER: Of Title 18, Section 656 as it appears in Title 18 is bank fraud and embezzlement.

"MR. BOGUE: That was not the specific charge, though, in the indictment.

"THE COURT: *The Court will deny a motion for mistrial.* Use misapplication of bank funds.

"MR. MUNSINGER: Very well, Your Honor.

(Whereupon, the following proceedings were had in open Court, in the presence and hearing of the jury)

"BY MR. MUNSINGER:

"Q: Sir, did the four counts, four felony counts that you were convicted of have to do with misapplication of bank funds?

"A. Yes.

"THE COURT: Go ahead, please.

"BY MR. MUNSINGER:

"Q. The time period that those four counts alluded to, was that shortly prior to and during —

"MR. BOGUE: Excuse me, Your Honor. May we approach the bench again?

"THE COURT: You asked the period, the date of the conviction?

"MR. MUNSINGER: Yes, Your Honor.

"MR. BOGUE: I think the witness has already testified to that, Your Honor.

BY MR. MUNSINGER:

"Q. When was the date of the conviction, sir?

"A. January 1976.

"Q. When was the alleged offense that you were convicted of?

"MR. BOGUE: Your Honor, I'm going to object to that. I think it's —

"THE COURT: The Court will sustain the objection. Ladies and gentlemen of the jury, the Court will give you this instruction at this time. The evidence of a defendant's or accused's previous conviction of a felony may be considered by the jury only insofar as it may affect the credibility of the Defendant as a witness, and must never be considered as evidence of guilt of the crime for which the Defendant is on trial. Do you understand that, ladies and gentlemen?

"THE JURY: Yes.

"THE COURT: You may determine it as to credibility, but not evidence as to guilt to the offenses charged. Do you understand that, please?

"THE JURY: Yes.

"THE COURT: This is your understanding of the law?

"MR. MUNSINGER: It is, Your Honor.

"THE COURT: Is this your understanding of the law?

"MR. BOGUE: Yes, Your Honor. Thank you for that instruction.

"MR. MUNSINGER: I would have a few additional questions.

"THE COURT: Go ahead, please.

BY MR. MUNSINGER:

"Q. Did that conviction come from a trial?

"A. Yes.

"MR. BOGUE: I object. This is going beyond the scope.

"THE COURT: The Court will sustain the objection. I think the witness has answered the question. The Court will preclude you from any further inquiry in this matter."

It is submitted that the repeated efforts of the U.S. Attorney amounted to "prosecutorial misconduct" whether deliberate or inadvertent. Further, the instruction to the Jury is the best effort that the Court can make, *but* it is a myth to believe that such prejudicial information and conduct can or will be neatly erased from the minds of the Jury.

IV.

ERROR WAS COMMITTED WHEN THE COURT IGNORED AN INQUIRY FROM THE JURY IN THIS MATTER AS TO THE RESPONSIBILITY OF ONE PARTNER FOR THE ACTS OF ANOTHER PARTNER.

Please refer to the Transcript at p. 737, L. 18-14, and p. 738, L. 5-8:

"THE COURT: The hour now is 4:15, and the jury passed the following notes to the Court. One was at 3:30 or 3:50. Can we have a break and something cold to drink. And that has never been responded to.

"Shortly thereafter, "What is law concerning the responsibilities of a partnership, also more ventilation." Joe Lopez, Juror Number 1 is the Foreman of the jury.

"The order of the Court is going to be to have the jury return to the Courtroom, and *the Court is going to decline their inquiry to respond to that question.* That they must be

guided by the Court's instructions of the law." (emphasis supplied)

It is submitted that since nothing in the Court's instructions mentioned partnerships and the responsibility of partners, that the inquiry should have been answered. The jury could well have been considering whether acts of one partner could be imputed to another partner to establish legal liability in that regard.

V.

LACKING SPECIFIC TESTIMONY AND/OR EVIDENCE ADDUCED IN THE COURSE OF THE TRIAL, THE JURY HAS NO BASIS TO FIND THE ACCUSED GUILTY AS CHARGED IN THE INDICTMENT

The language of the Indictment in Count 2 reads as follows:

> " . . . such use of the mails being as follows: the defendant, RAY J. BERAN, on or about December 17, 1973, in the District of Colorado, willfully and caused to be placed in an authorized depository of the United States mails, ar envelope addressed to Louis C. and Ida M. Thies, Hays Springs, Nebraska 69347, which envelope contained a non-transferrable note of Ray J. Beran . . . in violation of Title 15, United States Code, Section 77q(a) and 2".

It is respectfully submitted that at no time during the trial was there testimony as to this act of the Defendant, Ray J. Beran. There was no testimony as to his being in said state at such time or, in any way, directing or causing to be directed, the commission of the specific acts as charged.

Lacking such specific testimony it seems clear error for a jury to so convict.

Further, as to Counts 3, 4, and 5, it is found the language:

> " . . . defendant knowingly caused to be delivered by mail at Denver, within the State and District of Colorado, according to the directions thereon, an envelope addressed to . . . which envelope contained a check, dated April 1, 1974, payable to (the names of addressees varied in Counts 3, 4, and 5) in the amount of (the amount varied as to each of the three (3) named parties), all in violation of Title 18, United States Code, Sections 1341 and 2."

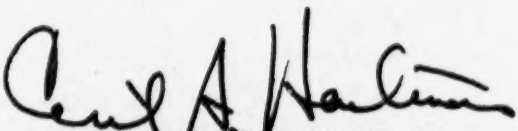
Counsel has diligently searched the record and can find no testimony of this defendant "causing to be delivered by mail at Denver, within the State and District of Colorado . . . an envelope addressed to . . . ", anybody.

Counsel truly believes it is fair to question the propriety of the jury making a finding of guilty as to facts not in evidence.

CONCLUSION

For the reasons herein set forth, the Petitioner respectfully prays this Honorable Court will issue its Writ to the United States Court of Appeals for the Tenth Circuit.

RESPECTFULLY SUBMITTED this 3rd day of February, 1981.



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APPENDIX "A"

11-6-80 79-1581

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 79-1581
	)	
RAY J. BERAN,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
For the District of Colorado
(D.C. No. 78-CR-392)

Submitted on the briefs:

Joseph Dolan, United States Attorney, and Richard S. Vermeire, Assistant United States Attorney, Denver, Colorado, for Plaintiff-Appellee.

Ray J. Beran, Pro Se, Grand Island, Nebraska, Defendant-Appellant.

Before PICKETT, McWILLIAMS and DOYLE, Circuit Judges

PICKETT, Circuit Judge

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R.App.P. 34(a); Tenth Circuit R. 10(e). This cause is therefore ordered submitted without oral argument.

Appellant Ray J. Beran, together with Andrew M. Kaminski and Russell E. Griffith, II, was charged in a five-count indictment with the use of the United States Mails in executing a device and scheme to obtain money from others by means of false and fraudulent presentations, in violation of 15 U.S.C. §77q(a) and 18 U.S.C. §§1341 and 2. Kaminski and Griffith pleaded guilty and testified for the government.[1] Beran was convicted on four counts of the indictment and duly sentenced. On Appeal it is contended for reversal that (1) the court erred in permitting the cross-examination of Beran with reference to a prior conviction and that there was prejudicial misconduct by the prosecuting attorney during this cross-examination; (2) the evidence is insufficient to support the conviction; and (3) the court's instructions did not properly state the theory of the defense.

The gist of the alleged scheme to defraud is that Beran and Kaminski, operating as a business entity known as "Beran-Kaminski & Associates," devised a program to sell investors non-negotiable notes signed by Beran and Kaminski with the representations that the proceeds from such sales would be placed in escrow with a trustee and used primarily for the purchase of interest in banks in which an investor would have the option to participate to the extent of his investment or a

---

[1]The record indicates that Griffith later withdrew his plea of guilty and was convicted on trial to a jury.

return of the amount paid, when, in fact, the money received was to be used, and was for the personal benefit of, Beran and Kaminski.

Beran had previously been convicted in the United States District Court for the District of North Dakota on four counts of an indictment charging him with violation of the banking laws of the United States. That conviction was affirmed in the United States Court of Appeals for the Eighth Circuit. United States v. Beran, 546 F.2d 1316 (1976), cert. denied, 430 U.S. 916 (1977). Before trial, Beran filed a motion requesting the court to determine that in case Beran was a witness in his own behalf, cross-examination as to the prior conviction should not be permitted. After a hearing, the court determined that the probative value of the evidence of the prior conviction outweighed the prejudicial effect upon the defendant, and overruled the motion. Beran testified in his own behalf and admitted the prior conviction on direct examination.

In United States v. Seamster, 568 F.2d 188 (10th Cir. 1978), this court discussed the conditions under which prior convictions of a witness could be shown for the purpose of testing credibility. Under Rule 609(a)(1) of the Federal Rules of Evidence, prior conviction of general felonies may be shown only after the trial court has determined that the probative value of the evidence outweighs the general effect upon the defendant. Referring to Rule 609(a)(2) in *Seamster*, at 190, we said: "All convictions involving dishonesty and false statements are admissible as they are considered to affect credibility." A defendant in a criminal case may be cross-examined as to prior convictions involving dishonesty or false statements and the trial court does not have discretionary power to reject it. The trial court here, in disposing of the motion, stated that it had studied the indictment in the South Dakota case, together with the opinion of the Eighth Circuit which

referred to the decision of the trial court. Obviously referring to Rule 609(a)(2), the trial court stated:

> The Advisory Committee notes use this language in part of Congressional debate as to whether a prior conviction shall be allowed to come in, and that is where there are aspects of dishonesty and prior conviction, false statement, and then they have as illustrative crime such as perjury, embezzlement, false statement, fraud, deceit, untruth, falsity bearing on propensity to testify truthfully.

The court specifically found that the probative value of evidence of the prior conviction outweighed the prejudicial effect on the accused. The South Dakota conviction was recent and we find no abuse of discretion in this finding. Furthermore, we are satisfied that the counts upon which Beran was convicted in that case were in the nature of embezzlement, and dishonest within the meaning of Rule 609(a)(2). The United States Court of Appeals for the Eighth Circuit said, in United States v. Beran, *supra*, at 1320: "There is evidence as to each of the counts upon which the appellants were convicted that there was a conversion of bank funds for their personal use or for the use of corporations in which they possessed a substantial interest." *See also* United States v. Field, 625 F.2d 862 (9th Cir. 1980); United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976).

It is urged that the cross-examination of Beran relative to the prior conviction amounted to prejudicial misconduct for which the court should have granted a mistrial. We find no merit in this contention. In United States v. Wolf, 561 F.2d 1376, 1381 (10th Cir. 1977), with reference to cross-examination on prior convictions, we said:

> . . . The cross-examination should be confined to a showing of the essential facts of convictions, the nature of the crimes, and the punishment. Care should be taken to protect the accused as far as possible from being convicted because of past conduct and not the crime for which he is being tried. . . .

The cross-examination objected to in the instant case was as follows:

> Q. Sir, isn't it a fact that the conviction referred to was in fact a conviction on four felony counts?
>
> A. That's correct.
>
> Q. Did those four felony counts refer to or concern bank fraud and embezzlement?
>
> MR. BOGUE: Your Honor, I will object to that.
>
> THE COURT: The Court will sustain the objection. The accuracy of that statement. You understand that, please?
>
> MR. MUNSINGER: Yes, Your Honor.
>
> THE COURT: You get the transcript or you get the reportered opinion and use the language in the opinion.
>
> MR. MUNSINGER: Yes, Your Honor. I understand that.
>
> THE COURT: Disregard the last question, ladies and gentlemen. It will be stricken from the record. Do you understand that, please?

Although the form of the question may have been objectionable, the prosecution was entitled to inquire into the nature of the offenses involved in the prior conviction. The record discloses that the court exercised extreme care to limit the prejudicial effect of the prior conviction evidence. There was no basis for a mistrial.

It is next contended that the prosecution failed to prove the existence of a scheme to defraud in which Beran was a part. A criminal conspiracy is an agreement between two or more persons to commit an unlawful act. It has been characterized as "a partnership in crime." Each conspirator is jointly responsible for the statements and acts of coconspirators in furtherance of the common scheme. 16 Am.Jur.2d *Conspiracy* §19; Pinkerton v. United States, 328 U.S. 640 (1946); United States v. Brewer, _____ F.2d _____ (10th Cir. 1980), filed September 26, 1980; United States v. Krohn, 573 F.2d 1382 (10th Cir.), cert. denied 436 U.S. 949 (1978). A scheme to defraud is one which is "reasonably calculated to deceive persons of ordinary prudence and comprehension." United States v. Wolf, supra; United States v. Seasholtz, 435 F.2d 4 (10th Cir. 1970).

The evidence tends to show that in 1972 Beran was interested in acquiring a bank in a small Nebraska town. He made arrangements with Kaminski to assist in raising funds for this purpose. Following this successful venture, they continued a business arrangement under the name of "Beran-Kaminski & Associates." Together they acquired control of three banks and numerous other unrelated activities. In 1973, Beran and Kaminski entered into a contract to acquire control of a bank in Dove Creek, Colorado. To finance this purchase they sold to the public a type of an interest which the Colorado Securities and Exchange Commission held to come under its jurisdiction. They were ordered to qualify with the Commission or return the money to the investors. They elected to return the money. Beran and Kaminski found themselves short of cash to carry on their operations. They immediately devised a plan of selling to the public ten percent non-negotiable unsecured notes of Beran-Kaminski & Associates. Each note was

to be signed by Beran and Kaminski. The selling program was under the direction of Kaminski, who resided in Colorado. Beran remained in Nebraska and looked after their banking interests there. In soliciting sales, Kaminski used several salesmen, including an associate named Griffith. In the promotional efforts, their first contacts were with those who had invested in the Dove Creek project. Without exception, the prospective purchasers were led to believe that the money from their purchases would be placed with a trustee to be held in escrow until invested in specific enterprises, principally acquisition of interests in banks in which they would be permitted to participate. At no time during the selling program was a suggestion made to a prospective purchaser that the transaction was to be a mere loan to Beran and Kaminski or that the money received by them could be used as they saw fit. From late 1973 to early 1974, the receipts from sales totaled more than $250,000. At the request of the salesmen, substantially all of the checks executed by the purchasers were made payable to a trustee and received by him. None of this income, however, was invested, and it remained with the trustee only for a short period of time. It was withdrawn and used for the general operations of Beran or Kaminski, or both.[2] Some interest payments were made to the purchasers, but later there was a default and the purchasers lost their money.

There was ample evidence from which a jury could find that this note project devised by Beran and

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[2]Kaminski testified as follows:

> Q. Now, if you know, sir, the disposition of the funds that were obtained by these promissory notes is the next matter I am going to go into. I understand the checks were made payable to this Mr. Gower and as Trustee; is that correct?

Kaminski after the failure of the Dove Creek project was a swindle from the beginning, and that Beran, although he did not participate directly in the actual sales, was part of the scheme throughout its existence. He signed each note that was sold. He was in constant touch with the progress of the selling program by personal appearance in Colorado and by numerous telephone calls. He suggested to Kaminski and the salesmen a number of prospects. At the request of one of the purchasers he made a change in the note. He executed and delivered a receipt to a noteholder for the amount of money invested. After default in interest payments, he advised another purchaser not to worry.

It was not necessary for the prosecution to prove that Beran knew the details of the activities of all those engaged in the sale of the notes. It was sufficient if the

---

[2](Cont'd)

A. Yes.

Q. Did the money remain in that trust account?

A. No.

Q. What happened to the money after the checks went to Mr. Gower as Trustee?

A. It was put to work in wherever we needed it for paying the bank payments or the mortgages on the real estate, and wherever we needed it, really.

Q. By "we" you refer to yourself and Mr. Beran?

A. Yes.

* * *

Q. Did you have occasion to discuss with Mr. Beran the utilization of this money?

A. Yes. I would say that periodically we would talk about, you know, the money, where it would be, and he always kept me posted as to where we needed money as far as to make them payments or as far as the banking end of it was concerned.

evidence established that Beran knew the essential facts and played a part in the overall scheme. United States v. Feola, 420 U.S. 671 (1975); Blumenthal v. United States, 332 U.S. 539 (1947); United States v. Alvarez, 625 F.2d 1196 (5th Cir. 1980).

Finally it is contended that the court erred in its instruction to the jury relating to the defense of good faith, and in refusing to give the good faith instruction offered by Beran. Good faith and lack of criminal intent is a defense in mail fraud cases, and a defendant's theory of the case should be presented to the jury by an adequate instruction. Sparrow v. United States, 402 F.2d 826 (10th Cir. 1968); Steiger v. United States, 373 F.2d 133 (10th Cir. 1967). The court, however, is not required to give a requested instruction word for word. If the instructions given are sufficient to fairly present the issue, there is no error. United States v. Westbo, 576 F.2d 285 (10th Cir. 1978); United States v. Nolan, 551 F.2d 266 (10th Cir.), cert. denied, 434 U.S. 904 (1977).

On the issue of good faith, the court instructed the jury as follows:

> Instruction Number 31. You are further instructed that good faith on the part of the Defendant is a defense to a charge of mail fraud. That is if a Defendant did not act with the knowledge or falsity in an attempt to defraud, then you must find him not guilty.
>
> The term good faith refers to Defendant's good faith that the entire plan or scheme which has been devised, and which is the subject of the promotion is economically sound. References are not to defense good faith as to the existence of any particular fact or situation. Instead, as I indicated above, it is

> good faith that the entire plan will be successful as a business.
>
> You are further instructed, however, that no matter how firmly the Defendant may believe in the plan, his belief will not justify baseless, false or reckless representations or promises knowingly and willfully made.

The instruction is adequate to present the issue of good faith. Furthermore, we have considered the instructions as a whole and conclude that all the issues in the case were fairly presented to the jury.

AFFIRMED.

APPENDIX "B"

United States of America vs.

DEFENDANT

FILED United States District Court for
UNITED STATES DISTRICT COURT
DENVER, COLORADO
MAY 11 1979
DISTRICT OF COLORADO
JAMES R. MANSPEAKER, CLERK

RAY J. BERAN — DOCKET NO. 78-CR-392-1

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: May; DAY: 7; YEAR: 1979

COUNSEL
[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
[X] WITH COUNSEL Jeffrey A. Rogue (Name of counsel)

PLEA
[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE. [X] NOT GUILTY

ENTERED ON THE DOCKET
MAY - 8 1979
JAMES R. MANSPEAKER, CLERK

FINDING & JUDGMENT
There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY, counts 2,3,4,5

Defendant has been convicted as charged of the offense(s) of S.E.C. violations and mail fraud in violation of Title 15, U. S. Code, Section 77(q) and 2 and Title 18, U. S. Code, Section 1341.

SENTENCE & PROBATION ORDER
The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years and six (6) months as to count 2.

IT IS FURTHER ADJUDGED that defendant be confined for a period of three (3) years and six (6) months as to each of counts 3,4, and 5, said sentence to run concurrently with that imposed as to count 2.

IT IS FURTHER ADJUDGED that defendant pay a fine in the sum of $1,000.00 as to each of counts 2,3,4, and 5 or a total fine of $4,000.00. Defendant is to stand committed until the fine is paid or he is otherwise discharged.

IT IS FURTHER ADJUDGED that defendant be granted a stay of execution to May 21, 1979 at noon. Defendant is to report to the designated institution.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION
In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION
The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

D. Sherman G. Finesilver

Sherman G. Finesilver

Date May 7, 1979

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